

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

UNITED STATES OF AMERICA
and the STATE OF TENNESSEE,
ex rel, GARY ODOM and ROSS
LUMPKIN,

Plaintiffs,

V.

SOUTHEAST EYE SPECIALISTS,
PLLC, SOUTHEAST EYE SURGERY
CENTER, LLC, and EYE
SURGERY CENTER OF
CHATTANOOGA, LLC.,

Defendants.

Case No. 3:17-cv-00689
CHIEF JUDGE CRENSHAW

BEFORE THE HONORABLE

CHIEF DISTRICT JUDGE WAVERLY D. CRENSHAW, JR.

TRANSCRIPT OF PROCEEDINGS

February 24, 2021

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1 The above-styled cause came on to be heard on
2 February 24, 2021, before the Honorable Waverly D.
3 Crenshaw, Jr., Chief District Judge, when the following
4 proceedings were had, to-wit:

5
6 THE COURT: All right. Be seated. Good morning.
7 Let's see. We're here on Case 17-689, United
8 States of America versus State of Tennessee, Gary Odom and
9 Ross Lumpkin versus Southeast Eye Specialists and other
10 defendants.

11 If the plaintiff wants to make an appearance on
12 the record.

13 MR. CURLEY: Your Honor, good morning.

14 THE COURT: Okay.

15 MR. CURLEY: I thought you said defendants.

16 THE COURT: Either one.

17 MR. CURLEY: Matthew Curley and Scott Gallisdorfer
18 from Bass, Berry & Sims, on behalf of the defendants.

19 MR. DICKSTEIN: Good morning, Your Honor. Jeffrey
20 Dickstein on behalf of the relators.

21 THE COURT: Okay. Go ahead.

22 MS. MCINTYRE: Ellen Bowden McIntyre on behalf of
23 the United States.

24 THE COURT: All right.

25 MR. BANGLE: And Scott Bangle on the behalf of the

1 State of Tennessee. Good morning, Your Honor.

2 THE COURT: Okay. Good.

3 So we're here today on the defendants' -- I'm
4 sorry -- the State of Tennessee's motion to intervene.

5 Previously I've held a hearing, reviewed the
6 report and recommendation from the magistrate judge. And
7 since the last hearing the State and the United States have
8 filed two affidavits, which I assume -- I assume the
9 defendants have received.

10 MR. CURLEY: Yes, Your Honor.

11 THE COURT: I've reviewed the affidavits, as well.
12 So what I would do is -- we're here on the -- on the State of
13 Tennessee and Government's motions to intervene. So I'll
14 hear from them and then hear from the defendants and then the
15 state, government -- and federal government can have the last
16 word.

17 Now, to help us make this productive today, it
18 would be helpful to the Court if you all focus your arguments
19 on the two affidavits filed, Documents Number 99 and 100, I
20 believe. Obviously you're free to argue whatever you like.
21 I'm not restricting you. But that's what's going to be most
22 helpful to the Court.

23 So -- okay. Ms. McIntyre, are you going to make
24 the argument for the United States and the State of
25 Tennessee?

1 MS. MCINTYRE: Yes. Thank you, Your Honor. Of
2 course, Tennessee can add something if they wish to, but I
3 will be arguing first.

4 Good morning, Your Honor. Before we begin, I
5 wanted to briefly ask the Court to seal any portion of the
6 transcript in this case that contains references to the
7 sealed versions of the two agent affidavits since they are
8 currently under seal.

9 (Overlapping speech.)

10 THE COURT: Yeah, I can't do that, because there's
11 a procedure for sealing -- this is a public courtroom, to
12 which the public is invited, and there's a process for doing
13 that, which you have not followed. So that will be denied.

14 MS. MCINTYRE: Thank you, Your Honor.

15 This suit alleges that Southeast Eye Specialists,
16 which I'll call SEES, which is a company that provided --
17 that provides ophthalmology services like cataract --

18 (Lost teleconference connection.)

19 THE COURT: Well, looks like counsel in the
20 courtroom is up.

21 Can you hear me, Ms. McIntyre?

22 COURT DEPUTY: She's off.

23 THE COURT: Did it just disconnect?

24 (Respite.)

25 MS. MCINTYRE: Can the Court see me again, Your

1 Honor?

2 THE COURT: I can. You might want to start over
3 because we lost you pretty quick.

4 MS. MCINTYRE: Yes. I noticed. Is
5 there (indiscernible).

6 (Court reporter interruption for clarification.)

7 THE COURT: We couldn't understand you.

8 MS. MCINTYRE: I think there's an echo now. And I
9 want to maybe (indiscernible.)

10 THE COURT: You should probably work from -- you
11 should not use a speaker phone. That causes an echo.

12 MS. MCINTYRE: I am not doing that, Your Honor.
13 It was fine until I just rejoined. Would it trouble the
14 Court if I exited (indiscernible). It's hard for me to hear
15 with the echo.

16 THE COURT: We're having a hard time hearing you
17 as well.

18 Go ahead. Let's try to go forward.

19 MS. MCINTYRE: That's what I'm trying to do, Your
20 Honor. I think my echo is gone, and my picture has been
21 lost. So -- my apologies.

22 All right. Your Honor, I still have -- Your
23 Honor, can you -- can the Court hear me?

24 THE COURT: Right now I can.

25 MS. MCINTYRE: Okay. I'm just going to -- if the

1 Court can see me, I'm going to proceed even though I can't
2 see, because otherwise I sort of hear an echo.

3 This suit alleges that SEES, a company that
4 provides ophthalmology services, like cataract surgeries,
5 caused the submission of false claims to Medicare and
6 TennCare that were tainted by kickbacks to optometrists to
7 induce them to refer their patients to SEES for surgeries.

8 Many courts have found this type of arrangement to
9 be illegal and that complaints with similar allegations
10 (indiscernible) motion to dismiss, such as in the *Teva*,
11 *Purcell* and *Medtronic* cases cited in the U.S.'s opposition
12 brief.

13 At the last hearing in this case this Court
14 ordered the U.S. to submit agent affidavits covering many
15 specific topics to provide an evidentiary basis for the Court
16 to find good cause for the U.S.'s and Tennessee's motions to
17 intervene. We submitted those two affidavits and Angel
18 Beverly's affidavit, in particular, which was 16 pages long,
19 provides ample detail and facts to support a finding of good
20 cause in this case, such as the good cause that was
21 recommended to the Court by Magistrate Judge Newbern in her
22 report and recommendation.

23 Agent Beverly's affidavit showed a number of
24 important things. First, it showed that in the initial
25 period of investigation, while this case was sealed, the

1 United States and Tennessee diligently investigated this
2 case. When looking at her affidavit, it reflects that the
3 government was taking affirmative steps essentially every
4 single month while this case was under seal -- under seal,
5 and that they were continuing and ongoing efforts to
6 investigate and ferret out the potential fraud, as alleged in
7 the Relators' complaint.

8 Secondly, her affidavit reflects that the U.S.
9 obtained new and significant evidence in the second period of
10 our investigation, which was after August 10th, 2019, and
11 after the U.S. had filed its notice of nonintervention at
12 that time.

13 During the second six-month period, Agent
14 Beverly's affidavit relayed that we acquired the following
15 additional evidence and analysis:

16 First, she said that we -- that the government
17 conducted several witness interviews of former SEES patients
18 and of its former SEES marketing employee, who the affidavit
19 describes as a product development manager, I believe, in
20 that period. And her affidavit in the redacted portions
21 explains why those interviews were significant.

22 Her affidavit also explains that the United States
23 and Tennessee obtained additional data that we did not have
24 in the earlier period. That data used a field that is
25 available that shows whether an optometrist has referred --

1 who was the referring optometrist for all surgeries SEES had
2 performed. Using this particular data field, we pulled all
3 of the referral data for all optometrists who had referred
4 patients for surgeries to SEES, and we looked at all of their
5 referrals, not just their referrals to SEES, but their
6 referrals to SEES as well as to any other ophthalmologists
7 for surgeries. This allowed us to compare their referrals to
8 SEES versus their referrals to non SEES ophthalmologists.
9 And that allowed us to see that some optometrists were
10 sending as much as 100 percent of their patients to SEES and
11 no patients to non SEES ophthalmologists.

12 With that information in hand, the United States,
13 according to Agent Beverly's affidavit, painstakingly matched
14 the evidence of kickbacks from those high-referring
15 optometrists to SEES to their receipt of kickbacks from SEES
16 in the form of continuing medical education credits, fancy
17 dinners at lavish restaurants, balls, parties, tickets to
18 professional sporting game events, that included people who
19 weren't on the staff -- who weren't just the physicians, but
20 their families and relatives, comanagement fees and
21 traditional gifts.

22 Her affidavit also describes how the United States
23 made a preliminary damages estimate in this second
24 investigative period after we filed our notice of
25 nonintervention at the time.

1 And although it is not mentioned in the affidavit,
2 because the Court didn't want us to discuss settlement
3 discussions, the U.S. did have an opportunity to meet with
4 the defendants and hear their perspective and consider that
5 perspective in this second phase after August 10th of 2019.

6 All this, collectively, provided the U.S. with
7 good cause to intervene by -- when the U.S. filed its motion
8 on February 14th, 2020, and I think about ten days or 12 days
9 later, when Tennessee filed its motion in 2020.

10 Agent Beverly's affidavit, in particular -- and,
11 of course, I emphasize hers because she was the lead agent
12 and the other agent wasn't assigned to the case until
13 after -- after we had made our intervention decision. Her
14 affidavit makes it very clear that we have met the good cause
15 standard, as Magistrate Judge Newbern found in her report and
16 recommendation.

17 And in terms of specifically applying the
18 affidavit to the standard, I wanted to say that, first, the
19 U.S. has shown good cause to intervene. Although, as
20 discussed in the *Griffith v. Chon* case in the Eastern
21 District of Kentucky in 2016, the U.S. is not actually
22 required to necessarily show new and significant evidence to
23 prove good cause, the U.S. has still satisfied that standard,
24 just as Judge Newbern recommended.

25 The new evidence consists of this new data

1 analysis, the new interviews, the matching of the data, which
2 required a painstaking amount of work by the U.S. Attorney's
3 office, with the kickbacks evidence to show what exactly each
4 doctor recommended who was -- I'm sorry -- what they received
5 in the form of a kickback, and the damages evidence -- or the
6 damages estimate.

7 The redacted portions of the Agent Beverly's
8 affidavit also explained why the evidence was particularly
9 significant and influenced the U.S. to be able to make that
10 decision.

11 The second part of the analysis is the undue
12 prejudice for delay component. The magistrate judge rightly
13 found that this standard primarily focuses on the Relator and
14 whether there's prejudice to the relator, but, of course,
15 here (indiscernible) the intervention.

16 The magistrate judge's opinion also correctly
17 found that there is not even one single case, even not cited
18 by the defendant, that -- that held that intervention should
19 not be allowed at such an early stage of the case before
20 discovery has begun.

21 In short, there are simply no case anywhere in the
22 U.S. saying that there would be undue prejudice in a case
23 like here where discovery hasn't started. In fact, there are
24 (indiscernible) cases in which courts have allowed
25 intervention at much later stages, like in the *Guidant* case

1 that was in this Middle District of Tennessee, in which Judge
2 Trauger allowed intervention for good cause two years after
3 the U.S. had declined. This is also significant because in
4 the *Griffith v. Chon* decision, the Court allowed the U.S. to
5 intervene three years after having declined.

6 Although the magistrate judge found that some --
7 that the filing of the motion to dismiss by SEES constituted
8 some minimal prejudice, she found that it was not weighty
9 enough to deny the motion for leave to intervene. This is
10 consistent with other court decisions. And, of course, in
11 the *Guidant* case there had been two motions to dismiss that
12 the Relators had withstood before the U.S. intervened. And
13 in the *Griffith v. Chon* case there had been three motions to
14 dismiss that had been filed by defendants.

15 So although defendants wish to point to the
16 motions to -- the filing of the motion to dismiss as undue
17 prejudice, it's simply -- that is not something that has been
18 found to be unduly prejudicial by any court anywhere in the
19 country.

20 SEES's counter argument that the U.S. would not be
21 harmed by a denial of our motion to intervene is incorrect.
22 The reality is that if the U.S. were denied this motion to
23 intervene, and if Tennessee's motion were denied, then the
24 government would have to confront a situation in which we had
25 to potentially file a new complaint, potentially have two

1 complaints pending on the same issues, the same transactions
2 and occurrences before this Court at the exact same time, and
3 potentially be consolidated. This is not what is intended
4 when Congress allowed the U.S. to intervene later for good
5 cause.

6 And, in short, this case is in the early stages,
7 and it would not be uncommon for a plaintiff to even seek to
8 still amend their complaint in this early phase, which is
9 akin to what the U.S. and Tennessee will do when and if the
10 Court grants the motion that would allow us to file -- to
11 intervene in this case and file our own complaint in
12 intervention.

13 In short, we believe that with the addition of the
14 two affidavits that the Court ordered us to submit, the U.S.
15 has provided an evidentiary basis for the Court to grant our
16 motion to intervene. I will also let Tennessee speak, but I
17 briefly wanted to point out that in terms of the Defendants'
18 objections to Tennessee's motion to intervene, I think the
19 affidavit of the two -- the two affidavits amply
20 (indiscernible) that Tennessee has been involved in actively
21 investigating this investigation as the lead agents, and
22 Tennessee's motion should be granted for the same reasons,
23 and their statute tracks -- the Tennessee Medicaid False
24 Claims Act statute has almost the identical language to the
25 False Claims Act, and thus they should also have their motion

1 granted, Your Honor.

2 We do ask the Court respectfully --

3 (Lost teleconference connection.)

4 THE COURT: Ms. McIntyre, are you still there?

5 Okay. I think we've lost her. But I also think
6 she was probably near the end. So I'm going to turn it over
7 to you.

8 MR. BANGLE: Almost made it, Your Honor.

9 THE COURT: Go ahead.

10 MR. BANGLE: Thank you. Good morning. Philip
11 Bangle on behalf of the State of Tennessee. Ms. McIntyre
12 made her arguments on behalf of the government, including the
13 State of Tennessee and the United States. And just to make
14 clear for the record, the State of Tennessee endorses and
15 adopts those arguments.

16 THE COURT: All right. Thank you.

17 Well, let's go to the defendant. Mr. Dickstein?

18 MR. DICKSTEIN: For relators. On behalf of
19 relators.

20 THE COURT: Do you want to add anything on the
21 motion?

22 MR. DICKSTEIN: Judge, I would -- I would
23 emphasize to the Court the relators strongly consent to
24 government intervention in this case. The government --
25 relators don't always do that. In many instances there

1 are -- where the cases are developed, where depositions have
2 been taken, where documents have been reviewed, where cases
3 are far along, in that case when the government wants to
4 swoop in and take over the litigation, we would object
5 because we've handled this case. That's not the case here,
6 because really we haven't started. It's really in the
7 embryonic stages. And in terms of prejudice, where there
8 haven't been depositions and there haven't been document
9 requests or reviews done, it's very early, we don't see the
10 prejudice that Mr. Curley complains of.

11 And, frankly, Your Honor, this case involves
12 government money. We're always involved, bringing this to
13 the government's attention. But where State of Tennessee
14 money, and federal government money through Medicare, we
15 think this case is best prosecuted by representatives of
16 those government entities. That's our position, Your Honor.

17 THE COURT: All right. Thank you. So that takes
18 us to the defendants. Mr. Curley?

19 MR. CURLEY: Good morning, Your Honor. May it
20 please the Court. When we were last before the Court, the
21 Court noted that there was no evidentiary basis to conclude
22 that good cause existed to justify the government's motion
23 for late intervention, and certainly that -- that conclusion
24 was warranted.

25 In the filings prior to that hearing, the

1 government offered very little of substance and was
2 exceedingly bare on this point. In one of its pleadings it
3 submitted to the Court, it suggested that the government
4 should not have to, quote, put forth any particular
5 justification for seeking to intervene late after the Court's
6 deadline. And in another filing the government seemed to
7 dare the Court to decline intervention because no other case
8 had done so. And they've seemed to have doubled down on that
9 argument here today.

10 But no other district court's been faced with the
11 record that this Court has. Rather than point to new and
12 significant evidence, the Government has repeatedly pointed
13 to additional investigative steps that it has taken, whether
14 that's reviewing of documents that they had in their
15 possession long before August of 2019, looking at its own
16 Government claims data or interviewing additional witnesses.
17 And there's no explanation, none offered before our last
18 hearing, none offered today, as to why any of those
19 investigative steps could not have been taken prior to the 28
20 months of investigation leading up to its declination
21 decision, or the significance of those steps relative to its
22 late motion for leave to intervene.

23 Now with the benefit of the government's
24 submission following our last hearing, Your Honor, three
25 points come into much sharper focus. First, the claim by the

1 government in its notice of declination that it had not
2 completed its investigation during the 28 months that it had
3 since the filing of the case was clearly the result of large
4 periods of inexplicable government inactivity during the
5 course of that time period. In at least six separate months
6 prior to the intervention deadline, the Government engaged in
7 no investigation at all, according to the declaration of
8 Ms. Beverly. Those are the months of September and November
9 of 2017, June and September of 2018, and January and February
10 of 2019. In at least four other months the only
11 investigative activity noted in the government's declaration
12 was the receipt of documents from Southeast Eye, not the
13 review of documents, the receipt of documents. That was the
14 case in January, March, April, and May of 2018. So in ten of
15 the 28 months where the -- we have -- during the
16 investigative period, the government essentially did nothing.

17 While the government also notes requesting claims
18 data from its own contractors, it notes no analysis of any of
19 that data until after declination. And despite receiving
20 63,000 pages of documents by December of 2018 from Southeast
21 Eye more than seven months prior to declination, the
22 government only began a, quote, targeted document review in
23 July of 2019. And that, of course, was less than one month
24 prior to declination. It also acknowledged that its review
25 strategy left thousands -- tens of thousands of pages to

1 review at the time of declination. For its part, Southeast
2 Eye cooperated, was transparent with the government during
3 the course of the investigation, expended considerable
4 resources in reviewing and producing documents to the
5 government, voluntarily met with the government, as indicated
6 in the declaration, and voluntarily provided its own data
7 analysis to the government, as well, in March of 2019.

8 In the 28 months while the case was under seal,
9 that time period was punctuated by significant periods of
10 inactivity by the government. It's also difficult to imagine
11 how the government articulated that there was good cause
12 before the Court to extend the seal period repeatedly during
13 that 28-month time period based on what we now know. And
14 it's simply inexplicable that the government would represent
15 to the Court that it had not completed its investigation as
16 of August of 2019.

17 The second point, Your Honor, that comes into
18 clearer focus is that the government used the prolonged
19 sealed period to engage in one-sided discovery and litigation
20 under the cloak of the seal. The government acknowledged
21 that in page 3 of its response, Docket Number 88, that it
22 engaged in, quote, common litigation practice during the
23 sealed period with respect to the three depositions that it
24 took on the eve declination. And the government eliminated
25 any doubt as to its motives during the sealed period on page

1 17 of that same response where the government referred to its
2 investigation as, quote, a period of preintervention
3 discovery.

4 The eleventh hour depositions sought by the
5 government in July of 2019 now take on the air of attempting
6 to lock in testimony as if this were kind some kind of grand
7 jury proceeding, rather than an investigation of allegations
8 in a civil *qui tam* lawsuit.

9 All of this leads to the inevitable conclusion in
10 our estimation that the government abused the sealed period.
11 As a result, Southeast Eye was subjected to one-sided
12 discovery without access to a complaint, with no check on the
13 government's inquiry, without the ability to seek its own
14 discovery from the Government and third parties. In short,
15 without any due process that would be afforded to any civil
16 litigant that would appear before the Court. And there would
17 be no question, Your Honor, from our perspective that
18 prejudiced the defendants.

19 The third point that comes into sharper focus,
20 Your Honor, is the so-called conclusions reached by the
21 Government after declination are not tied in any significant
22 way to investigative activity. As of the date of the
23 declination decision in August 2019, the Government states
24 that it had, quote, serious concerns about SEES' potential
25 liability and that it had compiled voluminous evidence,

1 although it seemingly did not review that evidence.

2 The Government made those concerns known to
3 Southeast Eye prior to declination, as we've indicated
4 previously, but the Government then notes it had work left to
5 do, presumably all of the work that should have been done
6 during the investigative period. That work included the
7 review of documents that had long since been produced by
8 Southeast Eye, analyzing its own Government data that it
9 should have had in its possession all along, as well as a
10 handful of witness interviews.

11 The Government made -- has never made any showing
12 as to why any of that work could not and should not have been
13 done during the 28-month period that it calls the
14 preintervention discovery period. Rather, the Government
15 claims that new and sufficient evidence following the
16 declination caused its concerns to blossom into a full-blown
17 conclusion that Southeast Eye engaged in a violation of the
18 criminal kickback statute.

19 According to the Government, its conclusion is
20 supported by, quote, new evidence. But those are -- that
21 evidence is nothing more than the same allegations that
22 existed in the relators' complaint on day 1 of this case:
23 That Southeast Eye promoted the practice of comanaging
24 patients' postoperative care, that Southeast Eye failed to
25 give patients a choice about what ophthalmologists to seek

1 out for surgery, that they held reduced-price continuation
2 education seminars, and provided meals and entertainment and
3 gifts to optometrists. Those are the very same allegations
4 that were in the Complaint. And as we noted in our motion to
5 dismiss, and the record that's before the Court, they're the
6 very same information that was publicly available well before
7 this case was even filed. And we've -- there's a press
8 release that's attached to our motion to dismiss from
9 February 2017, which identifies the business model of
10 Southeast Eye as a comanagement business model, that reflects
11 its cultivation of relationships with optometrists as
12 referral sources. They're a specialty practice. All they do
13 is eye surgery. They don't have primary eye care there. So
14 this was no secret. There's also in the record before the
15 Court a calendar submission from Southeast Eye identifying
16 the events and activities that Southeast Eye held throughout
17 the time period at issue in this case.

18 So all of this information that the Government
19 claims is now new and significant evidence was publicly
20 available information long before this case was even brought.
21 And we vigorously dispute that any of this so-called evidence
22 amounts to a violation of the criminal kickback statute, but
23 the notion that new and significant evidence emerged
24 following declination that substantially changed the
25 government's views on this case is difficult to believe.

1 The entirety of the record before the Court, Your
2 Honor, from our perspective is clear. There was no excuse,
3 and certainly no good faith basis for the Government to seek
4 numerous extensions of the seal over a 28-month period. The
5 Government misused the seal period, using it not for
6 investigation, as the False Claims Act requires, but to
7 engage in improper, one-sided discovery as it acknowledged in
8 its response. These things substantially prejudiced the
9 defendants. The defendants incurred extraordinary and
10 unnecessary costs, deprived the defendants of due process,
11 and this significant delay may very well compromise the
12 defendants' ability to defend themselves regarding the
13 conduct alleged to have occurred many years ago, not to
14 mention the tremendous uncertainty of having a never-ending
15 federal investigation hanging over the head of a business
16 with no ability for the business to defend itself or have its
17 day in court during that preintervention discovery period
18 described by the government.

19 Your Honor, if good cause is to mean anything
20 under the False Claims Act, the record cannot amount to good
21 cause here to justify late intervention.

22 There are certainly not many cases concerning the
23 question of late intervention, but none of those cases has
24 the documented record that's before this Court of the
25 government's misuse of the seal period and the demonstrable

1 prejudice to the defendants resulting from that. As we've
2 noted, the government's not without recourse. The government
3 may file its own lawsuit against the defendants and proceed
4 in that fashion if it wishes. Ms. McIntyre articulated why
5 that may not be a preference to the Government, but that's of
6 no moment with respect to the issue that's before the Court
7 here today. We've heard no explanation, Your Honor, as to
8 why that really would not be a sufficient course for the
9 Government. What should not occur is for the Government
10 to -- is for the Court to reward the Government with respect
11 to its unjustifiable delay, its misuse of the seal period,
12 and the prejudice that it has caused the defendants.

13 And so, Your Honor, we would respectfully submit
14 that the Court overrule the recommendation of the magistrate
15 judge and proceed with ruling on the defendants' motion to
16 dismiss and deny the government's motion for late
17 intervention.

18 THE COURT: All right. Thank you.

19 So I'm going to let Ms. McIntyre and Mr. Bangle
20 have the last word. Ms. McIntyre, do you want to go first?

21 You need to turn your microphone on.

22 MS. MCINTYRE: Thank you, Your Honor. The U.S.
23 obviously takes a different position than what Mr. Curley
24 described, but I would like to answer all of the questions
25 and points that he raised.

1 First, in terms of why his argument that the U.S.
2 should have discovered this evidence sooner and that it
3 doesn't constitute new evidence, we disagree. The U.S. does
4 not and should not have to take every possible investigative
5 step in an investigation on day 1 when a *qui tam* is filed.
6 An investigation builds on itself. You start at the
7 beginning with the relators' allegations and then you build
8 the investigation brick by brick, adding to the evidence as
9 the evidence comes in as a result of each step that you take.
10 And that includes following where the evidence leads and
11 taking additional follow-up steps as you find out where
12 everything is turning -- is going.

13 The U.S. and Tennessee simply were not ready to
14 intervene by the Court's deadline, and as we have said, we
15 did not have permission to intervene by our client agency at
16 that date. But we continued investigating, we filed briefs.
17 We were an active participant in this case. And in any case,
18 there is no requirement by -- I'm sorry. Your Honor is
19 looking questionable. I mean that we filed briefs. We asked
20 to be served with copies of pleadings. We continued to
21 engage with the defense, which was a consideration by the
22 Court in the *Griffith v. Chon* case in Kentucky.

23 In any case, there is no requirement that the U.S.
24 prove some standard like due diligence or that we couldn't
25 have discovered something sooner. There is nothing that

1 shows that evidence has to fall like manna from heaven from
2 the sky.

3 And Mr. Curley does not point to any case saying
4 that there's a standard like due diligence. The standard,
5 rather, is good cause, which the U.S. has shown through our
6 affidavits.

7 The defendants have argued that -- the defendants
8 in other cases who have made a similar argument that the
9 government must show that we couldn't have uncovered evidence
10 sooner have lost that argument; for example, in the *Guthrie*
11 decision, which we cited in our pleadings.

12 Mr. Curley also argued just now that the U.S.
13 didn't take any investigative steps in six particular months.
14 I haven't been able to go back during this argument and look
15 at those months, but I will tell the Court from my memory
16 what I believe is the case.

17 First, when he mentioned two months in November --
18 in 2017, I believe that that is the period when the prior
19 AUSA assigned to this case, Jason Ehrlinspiel, was preparing
20 to leave the office. I'm not sure. But I wasn't the
21 Assistant U.S. Attorney on the case at that time. And I
22 recall that since Mr. Erlinspealil is gone, there simply is
23 less that we can say about that portion of the case, because
24 he's not available to speak to it. Agent Beverly -- I think
25 that things were ongoing, but I think there's a sentence in

1 her affidavit about she can't state for sure what happened in
2 that particular point, because that AUSA has left the case.

3 Later on there -- he -- Mr. Curley mentioned a
4 period in 2018. Again, I would have to go back and double
5 check against the affidavit dates, but Agent Beverly
6 mentioned I know in one paragraph that she was preparing for
7 a trial during one month, and, therefore, had limited
8 bandwidth to work on this case in that month.

9 Now, Mr. Curley also mentioned something about
10 January, February of 2019. Though, again, I would have to
11 double-check, that to me rings a bell as to when the
12 government was shut down. And that would also possibly have
13 caused an impact. So I'm not sure that my dates match with
14 the dates that he's mentioning, but they may well. And
15 regardless, it's really not the point to nitpick about
16 whether we did something in every single week. I think Agent
17 Beverly's affidavit shows the U.S. was continuously,
18 diligently, and much more than in some other investigations,
19 working hard to ferret out the truth of the investigation and
20 whether there was fraud that the U.S. should act upon.

21 Now, Mr. Curley also essentially implied that the
22 U.S. somehow admitted that we were only doing targeted
23 document review in December of 2019. That is not what Agent
24 Beverly's affidavit says in my recollection. I think her
25 affidavit says that she believes that when Mr. Ehrlinspiel

1 was at the office, the government was doing reviews; however,
2 she can't verify that because those people are no longer at
3 the office. So she can't -- there's just no way for us to
4 verify that. And we can't say something that we can't verify
5 in a sworn affidavit.

6 In addition, I think it is significant that the
7 affidavit explains that the U.S., as soon as I got in the
8 case -- and I'm sure there was review going on before, but we
9 just can't vouch for it -- when I entered the case in
10 approximately the spring -- I think April of 2018, I
11 immediately negotiated for search terms with Mr. Curley
12 because email production had not begun. And following all of
13 that the first emails were produced -- I believe the last
14 email production, which was the largest email production, was
15 produced in May of 2019.

16 Now, once we got that email production, that
17 allowed us to do a lot more analysis, because, as the Court
18 surely knows, emails can contain a lot of helpful information
19 for an investigation.

20 Now, once we got that, the U.S. acted very quickly
21 to issue the civil investigative demands for testimony, which
22 were served I believe on July 9th. So within about five
23 weeks we got approval for the testimony to be taken. And
24 also in June of 2019, the U.S. served a civil investigative
25 demand for testimony to Pinnacle Bank so we could get

1 additional check evidence in terms of the kickback
2 allegations. In other words, checks from SEES to
3 optometrists who were referring patients.

4 In addition, I wanted to respond to Mr. Curley's
5 argument that the government has used one-sided discovery
6 under the seal.

7 The Government was not taking one-sided discovery
8 during the first phase of this case, or at any phase, because
9 we haven't been in the -- discovery phase (indiscernible)
10 yet. But rather, the U.S. was investigating the relators'
11 allegations for the purpose of making an intervention
12 decision. That is exactly what the statute allows us to do.
13 And what tools did we use -- because the Court may recall
14 that you asked Agent Beverly to say what investigative tools
15 we used -- we used civil investigative demands, which are a
16 statutorily authorized tool under the False Claims Act. And,
17 in fact, that's called an investigative tool by the Sixth
18 Circuit in the *U.S. v Markwood* case, which is at 48 F.3d 969
19 from 1995. And it states that Congress has given the
20 Department of Justice a particular type of investigative
21 tool, the False Claims Civil Investigative Demand, to enable
22 it to investigate whether there is a basis for remedying a
23 false claim made against the United States. And it goes on
24 to state, a false claims civil investigative demand may be
25 issued to any person having information relevant to a false

1 claims investigation. So there is simply no argument that we
2 were misusing our investigative tools. We were using the
3 investigative tools that we are allowed to utilize under the
4 statute. And we continued our investigation up until the
5 date in February 2020 when we had enough information to
6 intervene and ask the Court for leave to intervene.

7 Now, Mr. Curley also argued that all of the
8 evidence in our investigation was always publicly available.
9 The U.S. begs to differ. The U.S. -- first, just to remind
10 the Court that we have consented to waiving the public
11 disclosure bar. And that isn't because we think that that
12 would result in the dismissal of the complaint, but, rather,
13 this is a case in which the U.S. thinks there's an important
14 public interest at stake, and we have absolute and unfettered
15 authority to consent to waiving that bar, and we have done
16 so. So it's essentially a moot point that Mr. Curley is
17 raising.

18 Further, as the affidavit shows, the U.S. did a
19 lot of investigation that was not publicly available. All of
20 the information that we acquired in the form of testimony,
21 documents, witness interviews, that is not simply available
22 by doing a Google search. It just isn't.

23 Now, I also want to address something that when
24 Mr. Curley argues that the United States has misused -- I
25 can't quote all his words -- but when he argues that this is

1 -- has the worst facts than any other case in the country,
2 and that somehow the fact that there's no case that he can
3 cite saying that there's no good cause to intervene here
4 doesn't matter, that's not the case. We have very strong
5 evidence and facts showing that we had investigated this case
6 as thoroughly as we could and as fast as we could. We tried
7 to get to a point where we could decide by the Court's
8 intervention decision [sic], but we simply weren't there yet.

9 I wanted to also remind the Court of the Sixth
10 Circuit decision in *United States versus Health*
11 *Possibilities*, which is at 207 F.3d 335, a 2000 decision --
12 the year 2000 decision. And although that case was about a
13 different context, not in a leave to intervene context, the
14 Sixth Circuit (indiscernible) Congress has a manifest desire
15 to ensure that the Government retains significant authority
16 to influence the outcome of *qui tam* actions even when it
17 decides not to intervene.

18 The Sixth Circuit there also stated that the
19 Government can intervene for good cause at any time in the
20 litigation. Of course, there's Supreme Court cases that say
21 this, too. And, in general, I think it is very clear that
22 far from being the situation in which the U.S. sat idly and
23 did nothing, the U.S. has reflected in the 16 pages of facts
24 that were attested to by Agent Beverly the U.S. was
25 diligently investigating and we were not taking one-sided

1 discovery. We were using the lawful investigative tools that
2 are available to us.

3 In light of all this, the U.S. believes that the
4 affidavit supports the magistrate judge's recommendation that
5 the Court find good cause to intervene and that there is no
6 undue prejudice. And her ruling cites many decisions that
7 favor granting a motion to intervene in these circumstance.
8 And on the other hand, the defense has not cited one case
9 that has facts -- that cites denying a motion for leave to
10 intervene. Because we sit here today where discovery has not
11 begun, where there's a significant public interest at stake,
12 and where the U.S. is trying to take in -- take our proper
13 role by stepping into the relators' shoes and take over this
14 litigation by litigating it as the real party in interest, we
15 believe that it is appropriate for the Court to respectfully
16 please (indiscernible) the magistrate judge's recommendation
17 with the one addendum that, of course, you consider these
18 affidavits.

19 Thank you very much, Your Honor.

20 THE COURT: All right. Mr. Bangle.

21 MR. BANGLE: I have nothing more to add, Your
22 Honor.

23 Thank you.

24 THE COURT: Okay. Well, as I said before we
25 started, I've reviewed the file and updated my memory from

1 when we were here before. Also, I've studied the two
2 affidavits that were filed by the State of Tennessee and the
3 United States and considered those. And I -- and the -- and
4 I appreciate the effort of all the lawyers in making argument
5 today. So I'm going to go ahead and rule on the motion to
6 intervene.

7 The Complaint alleging violations of the False
8 Claim Act was filed on April the 7th, 2017, Document Number
9 1. From the date of filing until August 9, 2019, the State
10 of Tennessee and the United States requested and received
11 multiple extensions of time to decide whether or not to
12 intervene in this case.

13 On August 9, 2019, they made a decision and
14 notified the Court in a joint notice that they would not
15 intervene, Document Number 41. The Court unsealed the
16 Complaint for service of process on defendants, who filed a
17 motion to dismiss, Document Number 54, that is ripe for
18 decision.

19 The Court has delayed resolution of the pending
20 motion to dismiss because the United States filed a motion to
21 intervene six months after giving notice of its decision not
22 to intervene, on February 10, 2020, Document Number 65. The
23 State of Tennessee then joined the motion to intervene on
24 February the 24th, 2020, Document Number 72. And both the
25 State of Tennessee and the United States allege that there's

1 good cause to grant the motions to intervene.

2 The magistrate judge recommended that the motions
3 to intervene should be granted, Document Number 84. The
4 defendants timely filed objections to the magistrate's report
5 and recommendation. And the Court has considered and studied
6 the parties' briefs in regards to those objections.

7 Further, the State of Tennessee and the United
8 States have supplemented the factual record that was not
9 before the magistrate judge in the form of the affidavits I'm
10 going to be discussing.

11 Specifically, to assist the Court's consideration
12 of the motions to intervene, the Court held oral argument on
13 September 30, 2020, and ordered the State of Tennessee and
14 the United States submit, under seal, affidavits to detail
15 its investigation so that the Court has a factual or
16 evidentiary basis to determine if they have carried their
17 burden of establishing good cause to intervene, Document
18 Number 92.

19 The two Government entities did so by filing on
20 October the 26th, 2020, the affidavits of Angela B. Beverly,
21 and Phillip Cicero, Documents Number 99 and 100. And after
22 reviewing those affidavits, the Court set this date for a
23 final argument and hearing on the pending motions. The
24 pending motions to intervene are before the Court and ripe
25 for a decision.

1 So, the Court's analysis of the pending motions
2 begins with the bright line created on August 9, 2019, when
3 the governments filed a joint notice that they would not
4 intervene in this case, Document 41. This is important.
5 Because in determining whether Tennessee and the United
6 States have good cause to intervene now, the Court need only
7 focus on what good cause basis to intervene came to light
8 after August 9, 2020 [sic].

9 The affidavit of Beverly is helpful to isolate the
10 precise factual basis for the motions to intervene. The
11 affidavit of Mr. Cicero, Document 99, is not as helpful due
12 to his limited involvement in the investigation that
13 primarily focussed on before August 9, 2019 (see Cicero
14 affidavit paragraph 3, Document 99).

15 Beverly's affidavit explains that after August 9,
16 2020, Tennessee and the United States continued their
17 investigations that consisted of three sets of witness
18 interviews.

19 She explains to the Court, one, on August 15,
20 2019, an unnamed former practice development manager of
21 defendants was interviewed. That, quote, added to our
22 collective understanding, end quote, of Defendants'
23 recruitment and money spent for recruitment of optometrists
24 at recruiting events (Beverly affidavit paragraph 51).

25 Two, in September 2019, along with Assistant U.S.

1 Attorney McIntire, interviewed a nondefendant ophthalmologist
2 who, quote, expressed several concerns, end quote, about
3 defendants engaging in, quote, potentially unnecessary
4 cataract surgeries, end quote (Beverly affidavit at 52).

5 And, three, in November of 2019, four patients of
6 defendants were interviewed, but their, quote, memories
7 varied as to how much they recalled, end quote (Beverly
8 affidavit at paragraph 55).

9 Beverly also outlines that after August 9, 2019,
10 the United States and the State of Tennessee requested,
11 collected, and reviewed data and documents that she details
12 as follows:

13 One, in September and December of 2019, data and
14 documents were requested from Safeguard, which is the CMS
15 data contractor, on a number of referrals made by defendants
16 and nondefendant physicians, which the United States, quote,
17 planned to use to calculate the percentage of beneficiaries,
18 end quote, from those two groups of physicians (Beverly
19 affidavit at paragraphs 53 and 56).

20 Safeguard provided the data requested in January
21 of 2020, that the U.S. -- United States used to, quote,
22 perform analysis of optometrists referral patterns to
23 determine whether there were any differences between their
24 referrals, end quote, to defendants and nondefendant
25 providers (Beverly affidavit at paragraph 57).

1 Two, also in January of 2020, the United States
2 requested billing code data for cataract surgeries from
3 TennCare, that was provided on February the 14th, 2020
4 (Beverly affidavit at paragraph 57) which the Court notes is
5 after the United States filed its motion to intervene on
6 February 10, 2020.

7 In any case, these interviews and documents and
8 data requests comprise the entire universe of the United
9 States' and Tennessee's ongoing investigation after August 9,
10 2020. From August 9 -- after August 9, 2019.

11 From August 9, 2019, until February 10, 2020,
12 Ms. Beverly tells the Court, under oath, that the focus of
13 the -- the focus of, quote, the investigation was to look for
14 and identify evidence of kickbacks, other than and in
15 addition to comanagement arrangement alleged in the Complaint
16 filed in 2017 (Beverly affidavit at paragraph 58).

17 Ms. Beverly then states that from, quote, August
18 9, 2019, through February 10, 2020, the investigation
19 obtained, quote, new and sufficient evidence to demonstrate a
20 pattern of kickbacks from defendants referring optometrists
21 that resulted in the submission of false claims to Medicare
22 and TennCare, end quote, paragraph 59. She then gives a
23 conclusory summary of the, quote, types of kickbacks, end
24 quote, the investigation uncovered, and, quote, the key
25 things that pushed our conclusions forward and beyond what we

1 knew as of August 8th, 2019, end quote (Beverly affidavit at
2 60 and 61).

3 The United States and Tennessee acknowledged that
4 it has the burden to present, quote, new and sufficient
5 evidence, end quote, to establish good cause for their
6 motions to intervene. They rely almost solely on the Beverly
7 affidavit, although the Court placed no limitations on the
8 evidence it could offer to establish good cause.

9 A fair reading of Beverly's affidavit does not
10 support a finding that after August 9, 2019, the United
11 States and the State of Tennessee investigation found new
12 evidence after that date, or as a result of the totality of
13 its investigation.

14 Indeed, the United States and Tennessee's tepid
15 submission does not come close to establishing the good cause
16 necessary to intervene and take control of the litigation
17 nearly three years after the original complaint was filed,
18 and more than six months after the Court set a final deadline
19 for intervention that was extended six times.

20 The witness interviews after August 9, 2019, were
21 unremarkable. Beverly identifies three groups of interviews:
22 The interview with defendants' unnamed practice development
23 manager offered nothing new or different because Beverly says
24 it only added to their existing, quote, collective
25 understanding, end quote, of defendants' recruitment process.

1 Given that this unnamed witness mainly added to what was
2 already known, it could hardly be new evidence. The second
3 interview with an unnamed, unrelated, nondefendant
4 optometrist -- ophthalmologist disclosed his, quote,
5 concerns, end quote, about defendants, and, quote, concerns,
6 end quote, about possible unnecessary eye surgeries. Given
7 that this unnamed witness had no relationship with
8 defendants, his unsupported concerns is about all he could
9 offer. And those concerns can hardly constitute new
10 evidence.

11 Finally, the third group of interviews involved
12 defendants' patients. Here, Beverly admits those interviews
13 added nothing, because those patients could not recall much
14 about their experience with defendants referring
15 optometrists. Thus, the witness interviews taken
16 individually or considered together fall way short of
17 supporting Beverly's conclusion of new and sufficient
18 evidence of a pattern of kickbacks by defendants.

19 The document and data requests and analysis
20 described by Beverly fair no better. Tennessee and the
21 United States requested and reviewed data and documents from
22 Safeguard and TennCare, both of which are agencies of either
23 the United States or the State of Tennessee. So their data
24 and documents have been readily available to each long before
25 August 9, 2019.

1 And as noted above, some of the TennCare data was
2 received after the United States had already filed its motion
3 to intervene.

4 Beverly offers no explanation about how or why
5 their post-August 9, 2019, data and document requests and
6 reviews were different from, or even added insight into, data
7 and documents reviewed before August 9, 2020.

8 Most problematic to the Court is that the data and
9 document requests and reviews, as described by Beverly,
10 simply don't support that this information constitutes new
11 and sufficient information of a pattern of kickbacks, or the
12 type of kickbacks to support Beverly's conclusion in
13 paragraph 60.

14 Beverly concludes there that Safeguard and
15 TennCare provided data and documents that establish a pattern
16 of kickbacks, but Beverly offers no explanation of how
17 Tennessee and the United States reached that conclusion:
18 What analytical methods were applied to the data to support
19 that conclusion? Who did the data analysis? Or why the data
20 analysis is reliable so that the Court understands and should
21 accept and give weight to this unknown process?

22 Instead, it does appear that the State of
23 Tennessee and the United States simply expect the Court to
24 trust them because they say there is, quote, new and
25 sufficient evidence. This, the Court will not do.

1 The Court notes reference to settlement
2 discussions between the parties. And the Court finds it
3 inconceivable, if not illogical, that parties would engage in
4 settlement discussions without having a full understanding of
5 the strengths and weaknesses of their case. Indeed, to do
6 less would be almost an act of malpractice.

7 Also, during the argument, reference has been made
8 to the government's engaging in painstaking analysis, but the
9 Court sees none of that in the Beverly affidavit. Reference
10 to damage evidence, again, not in the Beverly affidavit, and
11 damage estimates.

12 The Court can only rely upon what's properly
13 before it. The lack of new evidence after August 9, 2019,
14 appears to be no surprise to the United States or Tennessee,
15 because they appear to admit that the, quote, entire second
16 investigative phase period, end quote, from August 9, 2019,
17 to February 10, 2020, focused on more, not new evidence of
18 kickbacks.

19 Beverly concedes that evidence of kickbacks was in
20 hand on August 9, 2019, when the United States and Tennessee
21 decided not to intervene. She states that the investigation
22 was seeking evidence of kickbacks, quote, other than, and in
23 addition to, the comanagement arrangement -- comanagement,
24 end quote, arrangements that were identified in the
25 complaint, paragraph 58.

1 While the logic of the government's investigation
2 strategy is unclear on this record, it is the opinion of the
3 Court that the governments have failed on this record to
4 establish new evidence to justify a good cause finding to
5 support the motions to intervene.

6 So the report and recommendation, Document 84, is
7 vacated. The objections thereto, Document 85, are sustained.
8 And the motions to intervene in Document 65 and 72 are
9 denied. And the Court's going to enter an order to that
10 effect.

11 So, Mr. Dickstein and Mr. Curley, that takes the
12 Court to your pending motions to dismiss, which the Court
13 notes were filed and -- am I correct -- I guess, Mr. Curley,
14 that's been fully briefed?

15 MR. CURLEY: Yes, Your Honor.

16 THE COURT: Mr. Dickstein?

17 MR. DICKSTEIN: Yes. It has been, Your Honor.

18 THE COURT: Okay. So this is what the Court wants
19 you all to do now that we've got the motions to intervene out
20 of the way.

21 Recognizing everything that's before the Court, it
22 appears that the parties at this early stage of the
23 litigation know much about this case. And what I'm going to
24 do is enter a motion -- I'm going to deny without prejudice
25 the pending motion to dismiss, because I'm going to also

1 order you all to proceed back to mediation. It's up to you
2 all on whether you want to invite others, the State of
3 Tennessee and the United States, to participate. You hold
4 the key to that. But the Court's going to ask you all to get
5 together and talk. Maybe today while you're here. Identify
6 a mediator, identify a date for a mediation, and advise the
7 Court about when that's going to take place, so I know what's
8 going on.

9 So I guess -- well, I'll just ask both of you.
10 What do you think is a reasonable time, Mr. Curley, for you
11 and Mr. Dickstein to get together, identify a mediator,
12 identify a date, and move forward?

13 MR. CURLEY: I suspected that the Court might ask
14 that question. I was thinking about that in my mind. I
15 think, given the current circumstances of the world, probably
16 six months would be necessary to -- to engage in the
17 mediation --

18 THE COURT: Oh, well let me stop. I'm not -- I
19 just want to know who the mediator is going to be. And I
20 want to know when it's going to be.

21 MR. CURLEY: I think we can probably within the
22 next two to three weeks identify that.

23 THE COURT: Yeah. Mr. Dickstein?

24 MR. DICKSTEIN: That would work. Sure.

25 THE COURT: Okay. So today is February the 24th.

1 Can you all file --

2 MR. DICKSTEIN: Judge, I might -- if I may?

3 THE COURT: Sure.

4 MR. DICKSTEIN: The concern is -- we can agree on
5 a mediator, I'm sure, quickly. The question is the
6 availability of a mediator to secure a date.

7 THE COURT: And that might go into the factor of
8 who you might hire.

9 MR. DICKSTEIN: Correct.

10 THE COURT: Because if they can't meet with you
11 until next year --

12 (Overlapping speech.)

13 THE COURT: But you all -- you pick. I'm not
14 going to dictate who you -- what you do.

15 So with that in mind -- but I would like to see
16 the mediation occur fairly promptly.

17 Okay. How about if you all file a notice with the
18 Court on or about March 19, 2021.

19 MR. DICKSTEIN: Identifying the mediator and a
20 date for mediation?

21 THE COURT: That's right.

22 MR. CURLEY: I think that would be fine, Your
23 Honor.

24 MR. DICKSTEIN: That will work, Judge.

25 THE COURT: All right. So I'll enter an order to

1 that point.

2 Okay. Mr. Dickstein, anything else the Court can
3 do to be helpful?

4 MR. DICKSTEIN: I think -- I think we're in
5 good shape -- good next step, Judge.

6 THE COURT: All right. You've got a -- that's
7 right. Judge Newbern is, of course, always available. And
8 if for some reason you all can't agree on a mediator, I'm
9 going to -- I'll just tell you, I'm going to send you to
10 Judge Newbern, but I can't believe you two can't talk and do
11 that.

12 All right. Mr. Curley, anything more the Court
13 can do?

14 MR. CURLEY: Nothing further, Your Honor.

15 THE COURT: All right. Thank you all.

16 (Court adjourned.)

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1 REPORTER'S CERTIFICATE

2
3 I, Lise S. Matthews, Official Court Reporter for
4 the United States District Court for the Middle District of
5 Tennessee, with offices at Nashville, do hereby certify:

6 That I reported on the Stenograph machine the
7 proceedings held in open court on February 24, 2021, in the
8 matter of UNITED STATES OF AMERICA and the STATE OF TENNESSEE
9 ex rel, GARY ODOM and ROSS LUMPKIN v. SOUTHEAST EYE
10 SPECIALISTS, PLLC, SOUTHEAST EYE SURGERY CENTER, LLC, and EYE
11 SURGERY CENTER OF CHATTANOOGA, LLC., Case No. 3:17-cv-00689;
12 that said proceedings in connection with the hearing were
13 reduced to typewritten form by me; and that the foregoing
14 transcript (pages 1 through 44) is a true and accurate record
15 of said proceedings.

16 This the 26th day of February, 2021.

17
18 /s/ Lise S. Matthews
19 LISE S. MATTHEWS, RMR, CRR, CRC
20 Official Court Reporter
21
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23
24
25